PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

DONALD F. ALLEN (aka Daudi Azibo),	:	
	:	
Charging Party,	:	
	:	**ULP 13-12-933**
v.	:	
	:	**PROBABLE CAUSE DETERMINATION**
DELAWARE STATE UNIVERSITY CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (AAUP),	:	**& ORDER OF DISMISSAL**
	:	
	:	
	:	
Respondent.	:	

Appearances

Donald F. Allen, PhD, Charging Party, pro se

Perry F. Goldlust, Esq., for AAUP-DSU Chapter

The Charging Party, Donald F. Allen (Dr. Allen) is a former employee of the Delaware State University[1] ("DSU") within the meaning of Section 1302(o), of the Public Employment Relations Act ("PERA"). 19 Del.C. Chapter 13 (1994). He was also a member of the bargaining unit and represented for purposes of collective bargaining by the Delaware State University Chapter of the American Association of University Professors.

The Delaware State University Chapter of the American Association of University Professors (AAUP-DSU) is an employee organization within the meaning of §1302(i), of the PERA and the exclusive bargaining representative of a bargaining unit of faculty and related

[1] Delaware State University is a public employer within the meaning of 19 Del.C. §1302(p).

employees of DSU, within the meaning of §1302(j) of the PERA.

On December 2, 2013, Charging Party filed an unfair labor practice charge ("Charge") alleging that AAUP-DSU has engaged in conduct which violates 19 Del.C. §1307 (b) which states:

> §1307 (b) It is unfair labor practice for a public employee or for an employee organization or its designated representative to do any of the following:
>
> 1. Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
> 2. Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee organization is an exclusive representative.
> 3. Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.
> 4. Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.
> 5. Distribute organizational literature or otherwise solicit public employees during working hours in areas where the actual work of public employees is being performed in such a way as to hinder or interfere with the operation of the public employer. This paragraph shall not be construed to prohibit the distribution of literature during the employee's meal period or duty-free periods or in such areas not specifically devoted to the performance of the employee's official duties.
> 6. Hinder or prevent, by threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment by any person, or interfere with the entrance to or egress from any place of employment.

The Charge alleges that when his employer, Delaware State University, did not renew his

tenure track teaching assignment on or about May 30, 2013[2], the AAUP-DSU by and through its President failed to file a grievance on his behalf. Dr. Allen attached to the Charge an email from the AAUP-DSU President dated March 19, 2013, in which the President states "I will file a grievance over this and ask for your non-renewal to be overturned."

On January 2, 2014, the AAUP-DSU filed its Answer in which it denied both the factual and legal allegations in the Charge. Appended to its Answer were documents indicating the AAUP-DSU President communicated with Dr. Allen by email on March 26 and April 2, 2013, specifically advising him that the AAUP would not be filing a grievance and detailing other options available to Allen for pursuing his complaint. Under a section of the Answer entitled New Matter , the AAUP-DSU alleges that the Charge is untimely because it was not filed within the statutory 180 day filing period. 19 Del.C. §1308.

On or about January 15, 2014, Charging Party filed its Answer to New Matter denying the new matter asserted by the AAUP-DSU. Dr. Allen denies he received the March 26 and April 2, 2013 emails, asserting the emails are "bogus".

DISCUSSION

On or about December 2, 2013, the Charge was transmitted to Dr. Steven Newton (the President of record in PERB files of the AAUP-DSU) with a requested response date of December 12, 2013. PERB later learned that Dr. Newton was no longer the union president. Thereafter, the Charge was retransmitted to his successor, Susan E. West, requesting the AAUP's Answer be filed on or before January 6, 2014. The Answer was received on January 2,

[2] It is unclear on the face of the pleadings what, if anything, occurred on May 30, 2013, which is relevant or material to this Charge.

2014.

By email to the Public Employment Relations Board, the Charging Party objected to the second transmission of his Charge to the AAUP for an Answer, stating:

> Regarding Donald F. Allen v. AAUP-DSU Chapter (ULP No. 13-12-933), please immediately issue a decision in my favor granting my requested actions. The Respondent (AAUP-DSU chapter) has failed to respond in keeping with the PERB timelines. I do not accept your arbitrary extension of "the customary period for responding to the Charge" stated in your December 18th letter to Susan E. West. I hold the Respondent and PERB to the lawfully allotted time frame. Extensions granted by you/PERB without due process are not acceptable and could be construed to represent collusion or favoritism on your/PERB's part by some disinterested, reasonable party. I am shocked at your action which could have been an oversight. Nonetheless, I look forward to completing the process.

The full Public Employment Relations Board recently considered a similar argument on an appeal and held:

> The Appellant argues on appeal that the Hearing Officer's decision to dismiss the Charge is improper, in part because … the Answer was not timely filed and he was entitled, as a matter of law, to prevail on the merits of his Charge.
>
> The Appellant's presumption that the alleged procedural error entitles him to judgment in his favor is in error. The Board's rules specifically require: "Upon review of the Complaint, the Answer and the Response, the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred…" PERB Rule 5.6. In reviewing the sufficiency of a Charge for purposes of determining probable cause, this Board has held:
>
> > Sufficient information must be included in the pleadings to allow a preliminary assessment of the procedural and substantive viability of the charge, i.e., the probability that there is sufficient cause to continue to process the charge. *AFSCME Council 81, Local 3911 v. New Castle County, Delaware*, ULP 09-07-695, VI PERB 4445 (2009).
>
> *Helene Ross v. Christina Education Association*, ULP No. 10-12-779, VII PERB 4951, 4953 (PERB Decision on Review, 2011).

PERB has defined the primary purpose of pleadings to be the formation of issues. Rule 5.1 directs that "all rules pertaining to pleadings shall be liberally construed towards effecting that end." *Richard Flowers v. State of Delaware, DTC/Margaret Failing, Maureen Alexander & Al Hillis* ULP 11-12-837, VII PERB 5399 (PCD & Order of Dismissal, 2012)

In this case, the Charge was not provided to the proper individual either by the Charging Party or by the administrative agency. Upon learning of the mistake, the PERB transmitted the Charge to the proper party and provided direction on the time frame in which an Answer must be filed. This is consistent with the precedent and practice established by the PERB and did not deprive the Charging Party of any substantive rights.

A review of the Charge, standing alone and viewed in a light most favorable to the Charging Party, however, reveals that it was not timely filed and therefore must be dismissed. The PERA states in §1308, Disposition of complaints:

> (a) The Board is empowered and directed to prevent any unfair labor practice described in §1307 (a) and (b) of this title and to issue appropriate remedial orders. Whenever it is charged that anyone has engaged or is engaging in any unfair practice as described in §1307(a) and (b) of this title, the Board or any designated agent thereof shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charge and including a notice of hearing containing the date and place of hearing before the Board or any designated agent thereof. Evidence shall be taken and filed with the Board; provided, that no complaint shall issue based on any unfair labor practice occurring more than 180 days prior to the filing of the charge with the Board. *(emphasis added).*

Appended to the Charge are documents which establish facts relevant to consideration of whether the Charge is filed within the statutory time requirement. Attachment 1 to the Charge is an email string which begins with a March 19 email from then AAUP-DSU President, Dr. Steven Newton to Dr. Allen, which states:

> Academic Affairs is stonewalling me, claiming that your meeting

> with Dr. Skelcher satisfied the requirement.
>
> I will file a grievance over this and ask for your non-renewal to be overturned.
>
> Sorry can't answer phone; in class.

The second email in the string is dated March 24, 2013 and is from Dr. Allen to Dr. Newton:

> I am happy to learn that things are moving forward with a grievance.
>
> (1) Please inform me of and copy me on all documents pertaining to the grievance.
>
> (2) Can you get copies of the grades for the Black Psychology course I taught Fall 2012? Again, I am convinced they have or intended to change grades. I regard this information as important.
>
> (3) In addition to this email address, I can be reached via surface mail at *[address provided]* and by phone at *[two phone numbers provided]*

The initial email correspondence between Dr. Allen and Dr. Newton supports the conclusion that Dr. Allen was aware and had been placed on notice by his employer that it did not intend to reappoint him or renew his contract for the 2013-14 academic year before March 19, 2013. He had been in contact with the AAUP-DSU prior to March 19, 2013 to discuss his contractual options for filing a grievance, as evidenced by Dr. Newton's email of that date. Dr. Allen's responsive email of March 24, 2013 indicates his belief that the AAUP-DSU was filing a grievance on his behalf and he requested specific information be provided to him. *Attachment #1 to Charge.*

Attachment #2 to the Charge is an email from Dr. Allen to Dr. Newton, dated April 22, 2013, which states:

> Dear Dr. Newton:
>
> I hope you are well.

> I am deeply concerned that I have not heard from you since you emailed me that you were filing a grievance on my behalf regarding my case. I have been waiting to receive correspondence from you regarding my case. I have emailed you as well as sent you surface mail certified, return receipt. The receipt has been returned over a week.
>
> Please let me hear from you ASAP. I understand that you/the union have a case coming up with the Public Employment Relations Board but I still expect to hear from you regarding my case. I think that what I have requested of you (copy of the grievance, etc.) is reasonable.
>
> Thank you. *Attachment 2 to Charge.*

This correspondence evidences Dr. Allen's concern that he had not yet received a copy of a grievance or received a response to a letter he sent to the AAUP-DSU. As of April 22, 2013 (at the latest) Dr. Allen was aware and expressed his concern that his interests were not being properly represented by the union. He also indicated in that email that he is aware of the Public Employment Relations Board and a pending charge against the AAUP-DSU.

The instant Charge was filed on December 2, 2013, 224 days after April 22, 2013. Consequently, it was filed outside of the statute of limitations for the filing of a timely charge under the PERA.

In its Answer to the Charge, the AAUP-DSU provided copies of documents which it asserts were emailed to Dr. Allen by Dr. Newton on March 26 and April 2, 2013, directly "replying" to emails sent by Dr. Allen. These emails specifically and unequivocally advise Dr. Allen that the AAUP-DSU will not be filing a grievance on his behalf because its investigation revealed no due process or contractual violations. In his Response to New Matter, Dr. Allen denies receiving this correspondence. I note that Exhibits A and B to the Answer each show the emails in question were sent to the same email address from which Dr. Allen sent his emails to Dr. Newton and both include date stamps indicating they were sent.

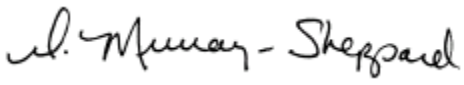
It is unnecessary, however, to make a factual determination as to whether Dr. Allen received the correspondence from Dr. Newton on or about March 26 and/or April 2, 2013, because this Charge was not filed within the 180 day period set forth in the statute.

DETERMINATION

The Charge was not filed within 180 days of the date on which the Charging Party knew or should have reasonably known that the AAUP had not filed a grievance on his behalf contesting his employer's decision not to reappoint him or renew his teaching contract for the 2013-2014 academic year. 19 Del.C. §1308.

WHEREFORE, the Charge is dismissed in its entirety because it was not timely filed.

DATE: February 25, 2014



Deborah L. Murray-Sheppard
Executive Director
Del. Public Employment Relations Board